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Monterey Transfer & Storage, Inc.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT - SAN JOSE DIVISION

RHONDA FARRAH,  
Plaintiff

v.

MONTEREY TRANSFER & STORAGE,  
INC., a California corporation,  
Defendant.

Case No.: Case No. C07-06044 JW

Complaint filed: 11/29/07

REPLY TO OPPOSITION TO MOTION  
TO DISMISS UNDER RULE 12(b)(1) and  
12(b)(6) OF FEDERAL RULES OF CIVIL  
PROCEDURE; DECLARATION OF  
LESLIE A. BLOZAN IN SUPPORT  
THEREOF.

DATE: April 7, 2008  
TIME: 9:00 a.m.  
COURTROOM: 8

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

DEFENDANT Monterey Transfer and Storage offers it reply to plaintiff's  
opposition to defendant's motion to dismiss the first amended complaint under F.R.C.P.  
12(b)(1) and F.R.C.P. 12(b)(6), set for hearing on April 7, 2008 at 9:00 a.m. in Courtroom  
8 of the United States District Court, Northern District, located in San Jose, California, as  
follows:

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## MEMORANDUM OF POINTS AND AUTHORITIES

## 1. INTRODUCTION

Plaintiff has always, incorrectly characterized this case as one of interstate commerce, subject to the Carmack Amendment. She has consistently, incorrectly asserted federal jurisdiction under 49 USC § 14706(d), (e)(1), 28 USC §§ 1331, 1137. Notwithstanding plaintiff's opposition to the pending motion to dismiss, the facts remain unchanged: the events described in plaintiff's pleadings do not involve interstate commerce, thus no federal jurisdiction exists.

Under Rule 11(b)(2) of the Federal Rules of Civil Procedure, plaintiff's counsel has certified that the claims and legal contentions contained in plaintiff's pleadings are warranted by existing law. Under Rule 11(b)(3), he has warranted that the factual contentions made in the pleadings have evidentiary support. Assuming the factual allegations of the pleading to be true, the transactions between Rhonda Farrah and Monterey Transfer & Storage, Inc., were strictly limited to intrastate commerce, within the state of California. Defendant's motion to dismiss is therefore well taken and properly granted by the court.

## 2. THERE IS NO FEDERAL JURISDICTION OVER PLAINTIFF'S CLAIM

As plaintiff correctly points out, "federal courts are not courts of general jurisdiction, they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." (*Bender v. Williamsport Area School Dist.* 475 U.S. 534, 541 (U.S.Pa.,1986), citing *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 173-180, 2 L.Ed. 60 (1803).) Applying the particular facts of this case to the jurisdictional issue, plaintiff must demonstrate the application of the Carmack Amendment to her move and storage. In her pleadings, she has not done so and cannot do so by further amendment.

1       ///

2       Questions of liability are irrelevant at this stage of the proceedings, when  
3 jurisdiction is in dispute. Plaintiff asserts “genuine factual issues” regarding “the loss of  
4 plaintiff’s properties committed by defendants.” She refers to the alleged loss of her  
5 stored goods and possible lack of notice of the time period for making a claim.<sup>1</sup> A second  
6 “genuine factual dispute” is asserted, addressing communications between defendant  
7 and plaintiff or her agent, pertaining to the alleged loss.<sup>2</sup> The issue of jurisdiction is not  
8 meaningfully addressed.  
9

10       Plaintiff admits that “...the shipment of plaintiff’s goods to defendant’s storage  
11 facility was within the state of California.”<sup>3</sup> Relying upon unpublished authority<sup>4</sup>, she  
12 contends that federal jurisdiction will attach to a case involving a shipment destined for  
13 interstate transit, but which was damaged while intrastate. This authority is inapplicable  
14 to the instant case, as the facts as pled by plaintiff show that plaintiff’s move was always  
15 within California, without any actual or intended interstate transportation.  
16

17       Once again, the first amended complaint alleges a local move and storage,  
18 between Pebble Beach, to Salinas to Carmel Valley, California. There is no allegation  
19 that plaintiff’s goods were ever governed by an interstate bill of lading, or that an  
20 interstate bill of lading ever existed for any aspect of the Farrah move. There are no  
21 allegations that the origin, storage or destination of the shipment was ever anywhere  
22 outside of California.

23       3. THERE IS NO BASIS FOR APPLICATION OF JUDICIAL ESTOPPEL.

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<sup>1</sup> Plaintiff’s opposition to motion to dismiss, page 5, lines 20-28.

25       <sup>2</sup> Plaintiff’s opposition to motion to dismiss, page 6, lines 1-13.

26       <sup>3</sup> Plaintiff’s opposition to motion to dismiss, page 6, lines 14-15.

27       <sup>4</sup> *Harris v. Crown Moving*, 2007 U.S. Dist. LEXIS 43111 (E.D. Wash., June 14, 2007), published as a slip  
28       opinion only.

1 Plaintiff seeks to assert judicial estoppel in order to create non-existent federal  
2 jurisdiction, but application of that doctrine is unwarranted. No inconsistent position has  
3 been taken by defendant. The problem lies in plaintiff's pleadings, not defendant's  
4 actions.

5 "Judicial estoppel precludes a party from asserting a position in a current legal  
6 proceeding which is contrary to the position that party previously asserted in another."  
7 (*Stevens Technical Services, Inc. v. S.S. Brooklyn* 885 F.2d 584, 588 (C.A.9 (Or.),1989),  
8 citing *Garcia v. Andrus*, 692 F.2d 89, 94 (9th Cir.1982); see also 1A J. Moore, J. Lucas  
9 and T. Currier, *Moore's Federal Practice* § . 405(8) (2d ed. 1984); *Patriot Cinemas, Inc. v.*  
10 *General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir.1987).) "Most circuits have refused to  
11 apply the doctrine of judicial estoppel unless the inconsistent assertion in the subsequent  
12 litigation was adopted in some manner by the court in the prior litigation. [Citations  
13 omitted.]... The purpose for this majority view is that absent judicial acceptance of the  
14 prior inconsistent position, no risk of inconsistent results exists. Thus, the integrity of the  
15 judicial process is unaffected and the perception and/or danger that either the first or  
16 subsequent court was misled is not present. [Citations omitted.]" (*Stevens, supra.* at pg.  
17 588-589.) The Ninth Circuit has acknowledged the doctrine of judicial estoppel and its  
18 effect of barring inconsistent positions. It has not stated the requirements of applying the  
19 doctrine." (*Stevens, supra.* at pg. 589.)

20 The original complaint filed by Rhonda Farrah clearly stated the Carmack  
21 Amendment as the basis for federal jurisdiction, yet pled California common law  
22 allegations of breach of contract and conversion, in the context of her local move and  
23 storage. There is no diversity jurisdiction, as plaintiff has correctly alleged that defendant  
24 is a California corporation. No other "federal question" is presented. Therefore, for  
25 plaintiff to remain in federal court, the **only** basis for jurisdiction must be the Carmack  
26 Amendment.

27 Defendant filed its initial motion to dismiss, addressing the state pre-emption  
28

issues only. This position is not inconsistent with the current motion, only preliminary to it. Plaintiff's counsel chose the forum and certified, under Rule 11(b) of the F.R.C.P. that the allegations were correct and supported by evidence. Based upon the allegations of the first amended complaint, the allegations are either incorrect, or unsupported by the evidence. It was appropriate that plaintiff amend the complaint, with the possibility that other facts existed which could be pled, bringing the claim within the ambit of Carmack.

Counsel for the parties discussed the issues of the case, and the fact that there was no federal claim under Carmack, based upon the facts alleged. The telephone conversations were confirmed by letter from defendant's counsel to plaintiff's counsel, dated January 22, 2008. This letter explained the difference between interstate and intrastate claims and advised counsel of the issues, including the complete absence of federal jurisdiction. (Blozan declaration, page 2, paragraph 3.)

Despite having actual knowledge of the lack of federal jurisdiction under Carmack, plaintiff filed her first amended complaint on February 1, 2008, asserting the same facts and basis for jurisdiction. The state claims were dropped and new facts were alleged, the majority of which served to confirm the intrastate nature of the transaction. The sole new allegation which suggested federal jurisdiction was the statement that "Monterey is [sic] motor carrier engaged in activities that affect federal interstate commerce, authorized pursuant to the Federal Motor Carrier Safety Administration Act<sup>5</sup>."

With the amended pleading, it became evident that the factual basis of the pleading is an intrastate move, not subject to Carmack. Mrs. Farrah only had two choices for her suit: to continue in federal court with the "proper" allegations, or to dismiss her action and pursue her claim in state court. She opted for federal court, knowing the inherent jurisdictional issues.

Plaintiff has suffered no prejudice from the two motions filed by defendant. The

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<sup>5</sup> First amended complaint, page 2, ¶ 3, line 12-14.




1 case is in the earliest stages of pleadings. There has been no reliance upon any actions  
2 taken by defendant, to date. Rather, defendant has sought to educate counsel on the  
3 intricacies of federal and state transportation law. There is no basis for judicial estoppel,  
4 as neither the court, nor plaintiff have been misled. No court has adopted any position  
5 taken by defendant. No risk of inconsistent results exists.

6 Based upon the foregoing argument and authorities, and based upon the  
7 argument and authorities presented in the pending motion, defendant respectfully  
8 requests that the motion to dismiss be granted.

9  
10 DATED: March 18, 2008

11 **STONE | ROSENBLATT | CHA**  
12 **A Professional Law Corporation**

13 By: \_\_\_\_\_

14   
15 GREGG S. GARFINKEL  
16 LESLIE A. BLOZAN  
17 Attorneys for Defendant Monterey  
18 Transfer and Storage, Inc.

PROOF OF SERVICE  
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

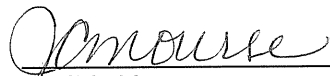
I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21550 Oxnard Street, Main Plaza, Suite 200, Woodland Hills, California.

On March 19, 2008, I served the foregoing document described as:  
*REPLY TO OPPOSITION TO MOTION TO DISMISS UNDER RULE 12(b)(1) and 12(b)(6) OF FEDERAL RULES OF CIVIL PROCEDURE; DECLARATION OF LESLIE A. BLOZAN IN SUPPORT THEREOF.*

on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

- ☒ (BY MAIL) I am familiar with the ordinary business practice of the law firm of Stone, Rosenblatt & Cha for collection and processing of correspondence for mailing with the United States Postal Service at the aforementioned place of business and that the above-entitled document was placed in a sealed envelope and deposited for collection and mailing on the date stated above, following such ordinary practices, and in such manner as to cause it to be deposited with the United States Postal Service that same day, with postage thereon fully prepaid, in the ordinary course of business, addressed as indicated above.
- ☐ (BY E-MAIL) I caused such document to be e-mailed to the addressee.
- ☐ (BY FACSIMILE TRANSMISSION) I caused such document to be faxed to the addressee.
- ☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.
- ☐ (BY EXPRESS MAIL, CCP 1013(c,d) I caused such envelope with postage thereon fully prepaid to be placed in the box regularly maintained by the express service carrier, Federal Express, at 21550 Oxnard Street, Suite 200, Woodland Hills, California, copies of the routing slips attached hereto.
- ☒ Executed on March 19, 2008 at Woodland Hills, California.
- ☐ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

  
Judith Nourse

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